

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

FTI CONSULTING CANADA INC.,  
in its capacity as Court-appointed monitor in proceedings  
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP,  
ESL INSTITUTIONAL PARTNERS, LP, EDWARD S. LAMPERT, WILLIAM R. HARKER  
and WILLIAM C. CROWLEY

Defendants

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,  
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP,  
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP,  
EDWARD S. LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL,  
WILLIAM CROWLEY, WILLIAM HARKER, R. RAJA KHANNA, JAMES  
MCBURNEY, DEBORAH ROSATI and DONALD ROSS

Defendants

**FACTUM OF THE ESL PARTIES  
(RE PRODUCTIONS MOTION)**

March 8, 2019

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TO: **THE LITIGATION SERVICE LIST**

Court File No. CV-18-611219-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

B E T W E E N:

FTI CONSULTING CANADA INC.,  
in its capacity as Court-appointed monitor in proceedings  
pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c. c-36

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP, SPE MASTER I, LP,  
ESL INSTITUTIONAL PARTNERS, L.P., EDWARD S. LAMPERT, WILLIAM HARKER  
and WILLIAM CROWLEY

Defendants

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Court File No. CV-18-611214-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

B E T W E E N:

SEARS CANADA INC., by its Court-appointed Litigation Trustee,  
J. DOUGLAS CUNNINGHAM, Q.C.

Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS LP, SPE I PARTNERS, LP,  
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, L.P.,  
EDWARD LAMPERT, EPHRAIM J. BIRD, DOUGLAS CAMPBELL, WILLIAM CROWLEY,  
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Defendants

Court File No. CV-18-611217-00CL

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**  
**(COMMERCIAL LIST)**

B E T W E E N:

MORNEAU SHEPELL LTD., in its capacity as administrator of the  
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Plaintiff

and

ESL INVESTMENTS INC., ESL PARTNERS, LP, SPE I PARTNERS, LP,  
SPE MASTER I, LP, ESL INSTITUTIONAL PARTNERS, LP,  
EDWARD S. LAMPERT, WILLIAM HARKER, WILLIAM CROWLEY, DONALD  
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Defendants

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Court File No. 4114/15 (Milton)

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

B E T W E E N:

1291079 ONTARIO LIMITED

Plaintiff

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*Proceeding under the Class Proceedings Act, 1992*

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## **PART I - INTRODUCTION**

1. This is not an ordinary civil proceeding between equally situated adversaries. It began with one plaintiff, the Monitor, gaining access to third party documents by virtue of its status as an officer of the Court. That plaintiff then supplied a subset of third party documents to a neutral court officer, the Litigation Investigator, which conducted its own review of the third party documents. After eight months of investigation, the neutral court officer made numerous recommendations, including that certain claims be commenced or continued against the ESL Parties and various other defendants and that the Court appoint a second plaintiff, the Litigation Trustee, to conduct certain aspects of the litigation. What was unique was the neutral court officer's recommendation that it be retained as counsel by the Litigation Trustee to prosecute those claims. As a result, the Sears Canada documents went from Sears, to the Monitor, to the Litigation Investigator, and then on to the Litigation Trustee.

2. These are also not ordinary allegations. The Monitor and Litigation Trustee accuse the ESL Parties of fraud, conspiracy, breach of fiduciary duty, and knowing receipt and assistance. The alleged bad faith conduct was so allegedly egregious as to have coerced eight independent, duty-bound directors of Sears Canada to vote unanimously for an improper dividend, all to the benefit of one group of shareholders. The Monitor and Litigation Trustee seek to have the ESL Parties commit to a defence of these inflammatory claims without seeing the Sears Canada documents on which they are based.

3. The ESL Parties bring this motion to gain equal access to what are effectively third party documents prior to being required to defend these claims. The Monitor and Litigation Trustee have refused to provide access to the documents. In doing so, they have ignored the unique

circumstances of this case and instead insist on a strict and unreasonable adherence to the rules applicable to first party discovery in the *Rules of Civil Procedure*.

4. Pre-pleading production in this case is straightforward: the Monitor has already collected and reviewed the documents sought by the ESL Parties. It is also unquestionably proper: the ESL Parties require them to plead. This Court should order production to secure the just, most expeditious resolution of these claims on their merits.

## **PART II - SUMMARY OF FACTS**

### **A. Background**

5. On June 22, 2017, Sears Canada Inc. (“**Sears Canada**”) and a number of its operating subsidiaries obtained an initial order under the *Companies’ Creditors Arrangement Act*, R.S.C., 1985, c. C-36 (“**CCAA**”).

6. The Monitor, FTI Consulting Inc., gained substantial access to Sears Canada documents upon its appointment. In its 11<sup>th</sup> report, the Monitor reported that it had undertaken research related to certain “Transactions of Interest” for the purposes of fulfilling the Monitor’s statutory mandate.<sup>1</sup> As part of that review, the Monitor obtained access to a database of over 100,000 potentially relevant documents from Sears Canada and it undertook a targeted review.<sup>2</sup>

7. The Monitor has incurred significant fees conducting this review.<sup>3</sup> It also has had access to Sears Canada documents for approximately 20 months.

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<sup>1</sup> Twenty-Seventh Report of FTI Consulting Canada Inc., as Monitor, November 5, 2018, at para 20. (“**Twenty-Seventh Report**”), Motion Record of the Former Directors (“**MRFD**”), Tab 2(I), at 183.

<sup>2</sup> Twenty-Seventh Report at para 22, MRFD at Tab 2(I) at 183.

<sup>3</sup> Invoices of Norton Rose Fulbright Canada LLP re services rendered to the Monitor, MRFD, Tab 2(J) at 244-319.

8. On March 2, 2018, this Court appointed the Litigation Investigator to consider litigation against various entities, including the ESL Parties. In particular, the Litigation Investigator was appointed for the purpose of investigating, considering, and reporting to a creditors committee regarding any rights or claims that Sears Canada and/or any creditors of Sears Canada might have.<sup>4</sup>

9. Under this Court's order, Lax O'Sullivan Lissus Gottlieb LLP in its capacity as Litigation Investigator "reviewed documents provided to it by [Sears Canada] concerning possible claims [Sears Canada] may have against various potential defendants."<sup>5</sup> Together the documents it received from Sears Canada and from the Monitor are the "**Litigation Investigator Documents**".<sup>6</sup> The same order required the Monitor and Sears Canada to maintain copies and a record of all documents the Monitor and/or Sears Canada provided to the Litigation Investigator.<sup>7</sup>

10. The Litigation Trustee later gained access to the confidential work product of the Litigation Investigator because he retained Lax O'Sullivan Lissus Gottlieb LLP as counsel on the recommendation of the Litigation Investigator.<sup>8</sup> This Court made no order authorizing either the Litigation Investigator or Lax O'Sullivan Lissus Gottlieb LLP to disclose any of the Litigation Investigator Documents or any of the Litigation Investigator's work product to the Litigation Trustee.

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<sup>4</sup> Amended order appointing the Litigation Investigator, pronounced April 26, 2016, at para. 2 ("**Litigation Investigator Order**"). Motion Record of the ESL Parties Re Pre-Pleading Productions at Tab 6 at 112 ("**ESL MR re Productions**").

<sup>5</sup> First Report of Lax O'Sullivan Lissus Gottlieb LLP in its capacity as Litigation Investigator, November 5, 2018, at para 11 ("**Litigation Investigator's Report**"), MRFD at Tab 2(K) at 325.

<sup>6</sup> Although the Litigation Trustee indicates that it only received documents from Sears Canada, it is apparent that the Monitor was involved in the production of documents to the Litigation Investigator from the dockets of its counsel. See, for example, the dockets of Robert Frank dated July 5, 2018, Lynne O'Brien dated July 6, 2018, and Catharine Ma, dated July 9, 2018. MRFD at Tab 2(J) at 310-313.

<sup>7</sup> Litigation Investigator Order at para 8, ESL MR re Productions at Tab 6 at 117.

<sup>8</sup> Litigation Investigator's Report at para 24, MRFD at Tab 2(J) at 328.

11. On December 19, 2018, the Litigation Trustee and the Monitor filed statements of claim against the ESL Parties alleging a number of causes of action related to the payment of a 2013 dividend unanimously authorized by Sears Canada’s board of directors (the “**2013 Dividend**”).<sup>9</sup>

**B. These motions are a continuation of the ESL Parties’ objections raised in the CCAA**

12. This motion is brought as a continuation of objections the ESL Parties raised in the Sears Canada CCAA proceeding. As part of that proceeding, this Court authorized the Monitor’s claim, appointed the Litigation Trustee, and lifted the stay against the former directors to allow the 129, Morneau and Litigation Trustee’s claims to proceed (the “**CCAA Authorization**”). At the time of the CCAA Authorization, the ESL Parties objected to the authorization and appointment on the basis that:

- (a) because the claims put at issue Sears Canada privileged documents, it would be an abuse of process to permit these claims to go forward without Sears Canada’s privilege in relation to the relevant documents first being waived; and
- (b) as a matter of procedural fairness, the Monitor and/or Litigation Trustee must disclose all of the Sears Canada documents reviewed by the Litigation Investigator during its appointment before the defendants are required to defend the action.

13. On consent, the ESL Parties deferred their objections to the CCAA Authorization so that they would instead be heard in this proceeding.<sup>10</sup>

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<sup>9</sup> Statement of Claim of the Litigation Trustee, issued December 19, 2018 and Statement of Claim of the Monitor, issued December 19, 2018. ESL MR re Productions at Tabs 2 and 4.

<sup>10</sup> Endorsement of Hainey J re Appointment of Litigation Trustee and other relief, BOA at Tab 10. Although the ESL Parties are not certain at the time this factum is filed, they are optimistic the parties will settle the issues around Sears Canada’s privilege.

### C. The Monitor and Litigation Trustee have produced a selective set of documents

14. The ESL Parties have received three briefs of documents from the Monitor and Litigation Trustee. In total, the Monitor and Litigation Trustee have provided just over 50 Sears Canada documents to the ESL Parties.<sup>11</sup> These documents are insufficient to permit the ESL Parties to plead since they are all documents carefully selected by the plaintiffs to support their cases.

15. The first two briefs were provided by the Monitor and Litigation Investigator in response to notices of request to inspect documents that Cassels Brock served on behalf of the directors they represent (together both are the “**Pleadings Briefs**”).<sup>12</sup>

16. The third brief was provided by the Monitor on February 20, 2019, and contained some of the documents the Monitor prepared as part of the investigation into the transactions of interest (the “**Monitor’s Brief**”).<sup>13</sup>

17. The Monitor and Litigation Trustee, both officers of the Court, assert that the existing production of approximately 50 documents is sufficient for the ESL Parties to plead. This is, on its face, untenable. These documents were carefully selected by the plaintiffs to support their claims and investigation into these matters. They could not contain the full body of exculpatory or explanatory documents that must exist. For example, the documents are mostly limited to board packages as well as minutes and there is very little correspondence. Having made serious allegations of fraud, breach of fiduciary duty, conspiracy and bad faith conduct, the Monitor and Litigation Trustee must afford the ESL Parties access to such documents.

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<sup>11</sup> See the Joint Responding Record of the Monitor and Litigation Investigator (“**JRMR**”) for the complete set of cherry picked documents received by the ESL Parties.

<sup>12</sup> JRMR at Tabs 1(F) and 1(G).

<sup>13</sup> JRMR at Tab 1(J).

**D. The Monitor and Litigation Trustee have refused to provide reasonable access to the identified documents**

18. Beyond these “cherry picked” documents, the Monitor and Litigation Trustee have refused to provide any Sears Canada documents to any of the defendants, including the former directors.<sup>14</sup>

**PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES**

19. This motion raises one issue, namely that this Court should order the pre-pleading production of the Litigation Investigator Documents. These are documents the Monitor has already reviewed and provided to the Litigation Investigator, who in turn provided them to the Litigation Trustee.

**E. This Court has the power to order production of the documents**

20. In the ordinary course of litigation, this Court has the broad power to order production at any time. The Rules of Civil Procedure provide that “[t]he court may at any time order non-privileged documents in the possession, control or power of a party to be produced for inspection.”<sup>15</sup> The Court of Appeal has confirmed that this rule allows a court to order production before the close of pleadings.<sup>16</sup> The Court of Appeal has also held that under some circumstances prior to the commencement of an action there is “a free-standing right of action to obtain an order for production”.<sup>17</sup>

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<sup>14</sup> Affidavit of John Birch, sworn February 7, 2019 (“**Birch Affidavit**”) at paras 31-42, MRFD at Tab 2 at 17-19. See also Affidavit of Geoff Mens, sworn February 21, 2019 (“**Mens Affidavit**”) at paras 3-11, JRMR at Tab 1 at 2-3.

<sup>15</sup> Rule 30.04(5).

<sup>16</sup> *Hong Kong (Official Receiver) v. Wing* (1986), 57 O.R. (2d) 216 (Ont. H.C.) at para 9, BOA at Tab 4. Cited with approval in *Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital*, 2006 CarswellOnt 8092 at para 6 (CA) [*Meuwissen*]. BOA at Tab 5.

<sup>17</sup> This is an order essentially akin to a *Norwich* order but where the relationship called for by the second threshold requirement is obvious because the order is sought against a person who is potentially party to the litigation: see *Straka v. Humber River Regional Hospital*, 2000 CarswellOnt 4114 at paras 37-39, BOA at Tab 8.



21. While most of the pre-pleading, post-commencement production is ordered where it is “necessary” to allow a party to plead, the Court of Appeal has not confined it in such a way. In describing the power under Rule 30.04(5) the Court of Appeal noted that a court “may” order production where it would “enable” the party to plead.<sup>18</sup>

22. In these unique circumstances the Court’s power is not limited to that under the *Rules*. Section 11 of the CCAA supplements this Court’s already broad powers to order production. Section 11 is engaged in this motion because this proceeding is a continuation of the ESL Parties’ objections in the CCAA proceeding.<sup>19</sup> This section allows the Court to make any order that would further the CCAA’s purposes<sup>20</sup> subject to the baseline requirements of appropriateness, good faith, and due diligence.<sup>21</sup> Appropriateness “extends not only to the purpose of the order, but also to the means it employs.”<sup>22</sup>

23. In addition to the above, this motion addresses the ESL Parties’ objections to the CCAA Authorization. It therefore falls to this Court to impose appropriate conditions on the implementation of an order made under its s. 11 power. The proceedings of the Monitor and Litigation Trustee have been authorized under the Court’s s. 11 power. Accordingly, this Court is entitled to, and should, require that these proceedings be brought in a fair manner that results in the most expeditious resolution of the claims.

#### **F. It is appropriate to order production of these documents**

24. On the facts of this case, and given the Court’s expansive powers, the Court should order pre-pleading production of the Litigation Investigator Documents. The Monitor and Litigation

<sup>18</sup> *Meuwissen* at para 6 (CA) BOA at Tab 5.

<sup>19</sup> Endorsement of Hainey J re Appointment of Litigation Trustee and other relief, BOA at Tab 10.

<sup>20</sup> *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60 at para 59 [*Ted Leroy*]. BOA at Tab 9.

<sup>21</sup> *Ted Leroy* at para 70. BOA at Tab 9.

<sup>22</sup> *Ted Leroy* at para 70. BOA at Tab 9.

Trustee's strict adherence to the discovery process in the *Rules* applicable to a party's own productions is not reasonable in these circumstances. Rather than engage in a meaningful discussion about how to secure the just, most expeditious and least expensive determination of these unique proceedings, the Monitor has indicated that productions are "premature"<sup>23</sup> and the Litigation Trustee has declared there is no entitlement to documents outside the discovery process.<sup>24</sup>

25. In doing so, the Monitor and Litigation Trustee have refused to recognize the unique circumstances of this case.

a. These are third party documents; the ESL Parties should have equal access to them

26. The Sears Canada documents that make up the Litigation Investigator Documents are essentially third party productions and should be treated as such. Neither the Monitor nor the Litigation Trustee would have the power, possession, or control over *any* of these documents in the ordinary course. Instead, as a result of the CCAA proceeding, and because it provided certain Sears Canada documents to the Litigation Trustee, the Monitor has, in effect, obtained and provided third party disclosure to some parties while refusing to provide it to others. It is of no moment that the Litigation Trustee claims in the name of Sears Canada because, at bottom, the Sears Canada documents are not those documents of the Litigation Trustee nor the creditors and "stakeholders" on whose behalf he seeks to recover.

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<sup>23</sup> Letter from Lynne O'Brian to John Birch, dated November 16, 2018, being Exhibit S to the Birch Affidavit. MRFD at Tab 1(S) at 381.

<sup>24</sup> Letter from Matthew Gottlieb to John Birch dated November 22, 2019 being Exhibit U to the Birch Affidavit. MRFD at Tab 1(U) at 387-388.

27. To the extent that the *Rules of Civil Procedure* provide guidance by analogy,<sup>25</sup> the practice under Rule 30.10 suggests the Monitor should have produced the Litigation Investigator Documents to all of the parties. Rule 30.10 concerns productions from a non-party. It is the most relevant rule by analogy because the Sears Canada documents are substantively third party documents: Sears Canada is not involved in this litigation, it has not authorized the litigation, and it does not stand to benefit from the litigation. By analogy to the practice for production from a non-party it would be appropriate to provide all of the parties with the relevant documents collected by the Monitor and received by the Litigation Trustee. This is because, ordinarily, when a party is successful in obtaining production from a non-party, the documents are provided to all of the parties immediately.

b. The ESL Parties are shareholders and were not privy to the subject of this litigation

28. The ESL Parties cannot defend either the Monitor or Litigation Trustee's claims without access to certain Sears Canada documents because the ESL Parties were not privy to the directors' decision making. The ESL Parties, as shareholders of Sears Canada, had no right to access documents controlled by Sears Canada or the right to information about the internal deliberation of the Sears Canada board. When the 2013 Dividend was declared, the ESL Parties did not have a formal connection to any one of the Sears Canada directors. Ordinary principles of corporate law are clear: the ESL Parties as shareholders of a publicly traded company do not have—and should not be presumed to have—knowledge of the directors' deliberations at a specific board meeting.

29. In its statement of claim, the Monitor alleges the payment of the 2013 Dividend was a “transfer at undervalue” within the meaning of s. 96 of the *Bankruptcy and Insolvency Act*, R.S.C.

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<sup>25</sup> *Rules of Civil Procedure*, Rule 1.04(2): “Where matters are not provided for in these rules, the practice shall be determined by analogy to them.”

1985, c B-3 (“**BIA**”). The core of the Monitor’s claim is that Sears Canada and the former directors declared the 2013 Dividend, knowing, and recklessly disregarding, “the fact that the [2013 Dividend] would have a material adverse impact on [Sears Canada’s] ability to continue as a viable business and pay its creditors”. In short, the Monitor claims that the directors exercised their powers improperly, and as a result the ESL Parties are liable to repay the 2013 Dividend.

30. Amongst other claims, the Litigation Trustee alleges the ESL Parties were unjustly enriched by the 2013 Dividend. As with the Monitor’s claim, this calls for an assessment of the former directors’ deliberations and conduct around the issuance of the 2013 Dividend.

31. The adversarial system demands that the ESL Parties have an opportunity to defend properly against these claims. To do so, the ESL Parties require access to the Sears Canada documents. Information about the deliberations and internal communications of the board, and the information then-available to the board, is relevant and necessary to defend against the Monitor and Litigation Trustee’s allegations. Without it, the ESL Parties will have to defend claims without knowledge of the relevant facts related to the actions of the former directors—knowledge that they could not reasonably be expected to have.

c. Fair access to Sears Canada documents is required to ensure the appropriate process required by the CCAA

32. To ensure the appropriate process for the conduct of these proceedings, which are, authorized under s. 11 of the CCAA, this Court should order disclosure of the Litigation Investigator Documents. By denying immediate disclosure of the documents, the Monitor and Litigation Trustee will exploit the CCAA process to gain an unfair and inappropriate advantage: the ESL Parties will have to commit blindly to a defence of the directors’ conduct *before* the details of that conduct are disclosed—and therefore before the ESL Parties can have any

reasonable grasp of the directors' conduct. To the contrary, an order for pre-pleading productions will ensure that the process authorized by this Court under the CCAA is fair and appropriate.

- d. An order for pre-pleading production will secure the just and most expeditious resolution of these matters

33. An order for the immediate production of the documents will advance the proceedings far more quickly than post-pleading production.<sup>26</sup> Pre-pleading production will allow the ESL Parties to file substantive defences, reducing the likelihood that they will need to amend their defences once they gain insight into the conduct of the directors.

34. Similarly, by allowing the ESL Parties to begin reviewing the Sears Canada documents now, it will allow the document review process to continue in parallel with the preliminary motions. This additional time will help ensure that the parties are ready for the trial date that is scheduled to commence in only 10 months' time.

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<sup>26</sup> Birch Affidavit at paras 43-44. MRFD at Tab (1) at 19.

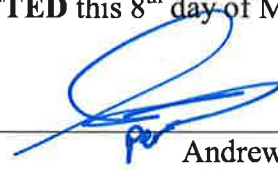
**PART IV - ORDER REQUESTED**

35. The ESL Parties seek an order requiring the Monitor, the Litigation Trustee, and/or the Litigation Investigator to produce to the defendants the Litigation Investigator Documents relevant to their claims.

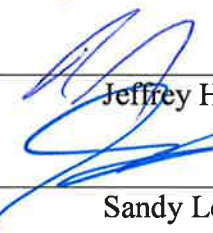
36. The ESL Parties further support the relief sought by the directors represented by Cassels Brock in their related motion for production.

37. The ESL Parties seek costs of this motion.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 8<sup>th</sup> day of March, 2019.



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## SCHEDULE "A"

### LIST OF AUTHORITIES

1. *Hong Kong (Official Receiver) v. Wing* (1986), 57 O.R. (2d) 216 (Ont. H.C.)
2. *Meuwissen (Litigation Guardian of) v. Strathroy Middlesex General Hospital*, 2006 CarswellOnt 8092
3. *Straka v. Humber River Regional Hospital*, 2000 CarswellOnt 4114
4. *Ted Leroy Trucking [Century Services] Ltd., Re*, 2010 SCC 60
5. Endorsement of Hainey J re Appointment of Litigation Trustee and other relief

## **SCHEDULE “B”**

### **TEXT OF STATUTES, REGULATIONS & BY - LAWS**

#### ***Rules of Civil Procedure, RRO 1990, Reg 194***

#### **INTERPRETATION**

##### **General Principle**

1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

##### **Proportionality**

(1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding. O. Reg. 438/08, s. 2.

##### **Matters Not Provided For**

(2) Where matters are not provided for in these rules, the practice shall be determined by analogy to them. R.R.O. 1990, Reg. 194, r. 1.04 (2).

[...]

#### **COURT MAY ORDER PRODUCTION**

30.04(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party. R.R.O. 1990, Reg. 194, r. 30.04 (5).

[...]



FTI CONSULTING CANADA INC., in its capacity as  
Court-appointed monitor in proceedings pursuant to the *Companies'*  
*Creditors Arrangement Act*, RSC 1985, c. c-36  
Plaintiff

-and- ESL INVESTMENTS INC. et al.

Defendants

Court File No. CV-18-00611219-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THE ESL PARTIES  
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